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IN THE
Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the California Supreme Court

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

Respondents' brief in opposition is more notable for what it doesn't say than what it does. Respondents do not deny that there is a deep and intractable split on what it means for a plaintiff's claims to "arise out of or relate to" a defendant's forum contacts. Respondents do not deny that the Court's past cases stated that a court would not have specific jurisdiction over a product-liability suit similar to respondents'—where the injury occurred and the product was manufactured and sold outside the forum. And respondents do not deny that in every case where this Court has found specific jurisdiction over a defendant proper, there has been at least a but-for

causal connection between the defendant's forum contacts and the plaintiff's claims—a connection that the California Supreme Court did not demand of respondents' claims.

Respondents instead resort to distraction and misdirection. They argue their case does not implicate the relatedness split—but point to legal irrelevancies and severely distort the record. They argue that the California Supreme Court's relatedness test is consistent with this Court's cases—but only at the highest level of generality. And they argue that the Court should await a better vehicle to answer the question presented—but ignore the ongoing, real-world harm being visited upon mass-tort defendants by the decision below. *See* Pharm. Research & Mfrs. of Am. Amicus Br. (PhRMA Br.) 7-10; Prod. Liab. Advisory Council, Inc. Amicus Br. (PLAC Br.) 22-25; GlaxoSmithKline Amicus Br. (GSK Br.) 6-9.

The petition should be granted.

ARGUMENT

I. RESPONDENTS' GROUNDS FOR DISTINGUISHING THE SPLIT ARE MERITLESS.

1. As the petition demonstrates, courts have divided into three camps over the degree of causation required to satisfy the "relatedness" prong of the personal jurisdiction test. Pet. 11. Some courts require "but for" causation. *E.g. Menken* v. *Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007). Others require "proximate cause" or foreseeability. *E.g. Harlow* v. *Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005). And still others—including the California Supreme

Court in its decision below—require no causal link at all. *E.g.* Pet. App. 22a.

Respondents do not dispute that well-established split. Nor do they dispute that California has chosen one side of it. *See* Br. in Opp. 11. Instead, they argue that this case does not implicate the split based on two irrelevant facts and one mischaracterization of the record.

The first irrelevancy is respondents' observation that McKesson, a separate defendant, has not challenged personal jurisdiction. Respondents say (at 10) that McKesson's involvement justifies asserting jurisdiction over Bristol-Myers, too. Yet the Court held 36 years ago that "[t]he requirements of *International Shoe* [*Co.* v. *Washington*, 326 U.S. 310 (1945)] * * * must be met as to *each defendant* over whom a state court exercises jurisdiction"; the "assertion of jurisdiction over [one defendant] based solely on the activities of [another defendant] * * * is plainly unconstitutional." *Rush* v. *Savchuk*, 444 U.S. 320, 331-332 (1980). Whether Bristol-Myers is subject to personal-jurisdiction does not change because respondents also sued someone else.

The second irrelevancy is that this suit includes both resident and non-resident plaintiffs. As respondents see it, so long as Bristol-Myers must litigate California plaintiffs' claims, it might as well litigate out-of-state plaintiffs' claims, too. Br. in Opp. 10. But "[t]here is no such thing as supplemental specific personal jurisdiction; if separate claims are pled, specific personal jurisdiction must independently exist for each claim and the existence of personal jurisdiction for one claim will not provide the basis for another claim." 5B Charles Alan

Wright et al., *Federal Practice and Procedure* § 1351 n.30 (3d ed. Apr. 2016 update). Were it otherwise, a State's permissive-joinder rules would be the measure of due process. That illogical result is not the law, and respondents do not cite a single authority suggesting that it is.

And then there is the mischaracterization. Respondents say, notwithstanding the California Supreme Court's acknowledgment to the contrary (Pet. App. 29a), that there *is* a causal connection between Bristol-Myers' California activities and respondents' claims. According to respondents, Bristol-Myers "distributed Plavix to non-residents through McKesson," and Bristol-Myers' "research and development activities in California were related to the claims of the non-residents of flaws in [Bristol-Myers'] drug development practices." Br. in Opp. 13.

Tellingly, no cite follows either of those assertions. That is because they are baseless. Respondents "have adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it to them." Pet. App. 47a-48a (Werdegar, J., dissenting) (emphasis omitted). And it is uncontested that "research and development of Plavix did not take place in California." *Id.* at 5a (majority opinion). Even the California Supreme Court did not rely on these supposed California connections. Respondents have simply invented them from whole cloth.

2. Beyond these false distinctions, respondents offer nothing to resist the inevitable conclusion: any court that requires a causal connection between the defendant's forum activities and the plaintiff's claim

would have dismissed respondents' claims against Bristol-Myers.

The court below admitted as much. Even though "the nonresident plaintiffs' claims would be exactly the same if [Bristol-Myers] had no contact whatsoever with California," Pet. App. 29a, the court thought the requisite connection present because "all the plaintiffs' claims arise out of [Bristol-Myers'] *nationwide* marketing and distribution of Plavix." *Id.* (emphasis added). Respondents repeat this phrase as if it is indicative of a causal connection. Br. in Opp. 12-13. But the California Supreme Court's comment that respondents' claims allegedly arose from Bristol-Myers' "nationwide" conduct does absolutely nothing to prove that they arose from the company's *California* conduct; it simply changes the subject.

Indeed, as the petition noted (at 16-18), essentially the same fact pattern has arisen in courts on the other side of the split, and in each case those courts came out the other way. *See Glater* v. *Eli Lilly & Co.*, 744 F.2d 213, 216 (1st Cir. 1984); *Ratliff* v. *Cooper Labs.*, 444 F.2d 745, 746-748 (4th Cir. 1971). Respondents speculate (at 10) that these courts might have reached different conclusions if those defendants had engaged in "nationwide marketing activities" like Bristol-Myers. But they did. The defendant in *Glater* had "marketed [the drug] nationwide since 1947," 744 F.2d at 214, and the defendant in *Ratliff* had run advertisements "in national medical journals," 444 F.2d at 748. The courts thought that conduct immaterial for a simple reason: the particular plaintiff's claims at issue "did not arise from" the defendant's "contacts with *the forum*."

Glater, 744 F.2d at 216 (emphasis added); *see Ratliff*, 444 F.2d at 747. Had the California Supreme Court applied the same standard, it would have dismissed respondents' claims, too.

3. Last, respondents purport (at 11) to show that the Court has often denied similar petitions. Not at all. In both of the California cases respondents' cite, as well as the Second Circuit case, there was no question that the defendants' forum conduct was a but-for cause of the plaintiffs' injuries; the only question was whether the *degree* of causation was sufficient. *See Snowney* v. *Harrah's Entm't, Inc.*, 112 P.3d 28, 44 (Cal. 2005) (claims "premised on alleged omissions during * * * transactions with California residents and in * * * California advertisements"); *Vons Cos., Inc.* v. *Seabest Foods, Inc.*, 926 P.2d 1085, 1099 (Cal. 1996) (injuries occurred "[b]ecause of [a] contractual relationship in California"); *Chew* v. *Dietrich*, 143 F.3d 24, 30 (2d Cir. 1998) (individual "recruited in [the forum state]" for fatal boat race). In *Avocent Huntsville Corp.* v. *Aten International Co.*, 552 F.3d 1324 (Fed. Cir. 2008), the Federal Circuit found personal jurisdiction lacking, making any failure to require but-for causation immaterial. *Id.* at 1326. And in *Domtar, Inc.* v. *Niagara Fire Insurance Co.*, 533 N.W.2d 25 (Minn. 1995), there was no dispute over relatedness at all; that case turned entirely on purposeful availment. *See id* at. 32-33.

The need to resolve this split has grown increasingly pressing in recent years. Five courts of appeals have taken a side in the last decade. *See Beydoun* v. *Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499, 507-508 (6th Cir. 2014); *Oldfield* v. *Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222-1223 (11th Cir.

2009); *Avocent*, 552 F.3d at 1337; *Dudnikov* v. *Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008); *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 323 (3d Cir. 2007). Since *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 920 (2011) and *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 754 n.5 (2014), plaintiffs have attempted ever-more-creative ways of replicating the old "doing business" test under the rubric of specific jurisdiction. Pet. 26, 29. And in California, plaintiffs can now shop suits between the federal courthouse and the state one to select their favored jurisdictional rule. *Compare Menken*, 503 F.3d at 1058, *with* Pet. App. 22a; *see also* GSK Br. 9; Chamber of Commerce Amicus Br. (Chamber Br.) 8-9. The Court should grant the writ and bring clarity and uniformity to this critical area of the law.

II. RESPONDENTS' ATTEMPT TO WAVE AWAY THE CONFLICT WITH THIS COURT'S CASES FALLS FLAT.

1. Nor can respondents wave away the conflict between the decision below and this Court's cases. Respondents do not contend that they suffered any Plavix-related injuries in California or that the Plavix they ingested was manufactured or sold in California. *See* Pet. 6. Respondents therefore do not contest that their claims do not fit within *Goodyear*'s rule that there is no specific jurisdiction in a product-liability case when the plaintiff's injury did not occur in the forum and the product alleged to have caused the injury was not manufactured or sold there. *See* Pet. 24. And respondents do not disagree that the California Supreme Court's analysis would permit the hypothetical Polish car accident *Daimler*, 134 S.

Ct. at 754 n.5, identified as a "question * * * of general jurisdiction" to proceed in California under a specific-jurisdiction label. *See* Pet. 26-27.

Respondents instead dismiss *Goodyear* and *Daimler*'s statements as "passing dictum." Br. in Opp. 14. But the binding "holding" of a case includes not just its result but also its "rationale." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 66-67 (1996). *Goodyear* and *Daimler*'s statements clarified the distinction between general and specific jurisdiction, a distinction that the courts below had "elided." *Goodyear*, 564 U.S. at 926. Indeed, *Goodyear* explicitly stated that the "North Carolina courts lacked specific jurisdiction to adjudicate" the plaintiffs' product-liability claims. *Id.* at 919. If that is not a holding, then not much is.

2. Respondents also argue (at 14) that there is no conflict because the decision below—in their view—adhered to *Goodyear*'s rule that specific jurisdiction is "confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." 564 U.S. at 919 (internal quotation marks omitted).

But saying that this Court's cases require a "connection" between the plaintiff's claims and the defendant's forum contacts merely restates the question presented. The question presented is how close the connection must be. *See* Pet. i. As we have demonstrated—and as respondents do not dispute—in every case where the Court has found specific jurisdiction, there has at least been a but-for causal relationship between the plaintiff's claims and the defendant's forum contacts. Pet. 22-23.

Indeed, *Walden* v. *Fiore*, 134 S. Ct. 1115, 1124 (2014) used just those words. It explained that there was specific jurisdiction in California over the defamation defendants in *Calder* v. *Jones*, 465 U.S. 783 (1984) because "the reputational injury caused by the defendants' story would not have occurred *but for* the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens." *Walden*, 134 S. Ct. at 1124 (emphasis added). The California Supreme Court's relatedness test, which does not require a but-for connection (*see* Pet. App. 30a), conflicts with this Court's cases.

3. The closest respondents come to defending the sliding-scale approach is to argue that it is consistent with this Court's disjunctive "aris[ing] out of *or* related to" formulation of the relatedness requirement. Br. in Opp. 14 (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985)). But the Court has explicitly "decline[d] to reach the question[]" of "whether the terms 'arising out of' and 'related to' describe different connections between a cause of action and a defendant's contacts with a forum." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 415 n.10 (1984). And there is no reason to think they do. Opinions are not statutes; every word need not have distinct meaning. *See United States* v. *Skoien*, 614 F.3d 638, 640 (7th Cir. 2010).

Respondents also contend that specific jurisdiction must be boundless because the Court has said that specific jurisdiction has "flourished" in the years since *International Shoe*. Br. in Opp. 16 (quoting *Daimler*, 134 S. Ct. at 758 n.10). And so it has. The

Court has held there can be specific jurisdiction in some circumstances over a manufacturer that sells products into the forum through a distributor, *see J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 884-885 (2011) (plurality opinion), or over a defendant who targets tortious conduct at the forum, even though he never sets foot there, *see Calder*, 465 U.S. at 788-789. But the Court has never reached as far as the decision below did.

4. Finally, respondents cannot ignore the violence that the decision below does to *Daimler*. Respondents block quote the California Supreme Court's assurances that its decision does not necessarily subject Bristol-Myers to jurisdiction on *all* claims in California. Br. in Opp. 16 (citing Pet. App. 35a). But respondents do not deny that the decision below subjects Bristol-Myers to jurisdiction in California on all product-liability claims. *See* Pet. 27-28. The California Supreme Court's expansive notion of specific jurisdiction is practically indistinguishable from general jurisdiction. *See* PLAC Br. 14-17; Chamber Br. 14-15; Wash. Legal Found. Amicus Br. 20-21. It is therefore at odds with this Court's cases.

III. RESPONDENTS' VEHICLE OBJECTIONS ARE MERITLESS.

1. Respondents are thus left to flyspeck this case's suitability as a vehicle to resolve the question presented. Br. in Opp. 17-20. Those efforts are unavailing.

Respondents claim (at 17) that the Court should await a case that can resolve both whether a causative link is required for relatedness, and, if so, whether a but-for connection is sufficient. But there is nothing that prevents the Court from laying down

a single standard for relatedness on these facts. And not many plaintiffs satisfy the but-for standard but flunk the proximate-cause test, as some courts have recognized in declining to choose between the two. *See* Pet. 12 n.2.

The essential disagreement among the lower courts is whether a causative link is required or not. *See* Pet. 11-16. The many cases arising on similar facts counsel in favor of resolving that dispute immediately. *See* PhRMA Br. 7-10; GSK Br. 6-9. If the Court wishes, it can always proceed incrementally—as it has in other contexts—in fleshing out the precise *degree* of relatedness required. *See Elonis* v. *United States*, 135 S. Ct. 2001, 2013 (2015) ("Such prudence is nothing new.").

2. Respondents also worry that reversing the decision below will have consequences for nationwide class and mass actions. Br. in Opp. 18. But class actions are different than mass actions, and involve different due-process principles. *Cf. Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-814 (1985). And changing current practice in nationwide mass actions is precisely why the Court should grant the writ. Plaintiffs' counsel use California's lenient relatedness rule to shop claims that have no connection to the State, seeking what they believe are juries more likely to return significant verdicts. *See* Pet. 32; PLAC Br. 23-24; Chamber Br. 18-19; GSK Br. 9, 16-17.

Respondents similarly overstate (at 18) the concern that no one court will be able to adjudicate a mass action involving plaintiffs from multiple States. Plaintiffs can all file where the defendant is incorporated or headquartered. *See Daimler*, 134 S. Ct. at

760 (recognizing that these locations afford "at least one clear and certain forum in which a corporate defendant may be sued on any and all claims"). Plaintiffs also may be able to sue in the State in which their product was designed or manufactured, depending on the nature of their claims and the defendant's manufacturing and design processes. *See Goodyear*, 564 U.S. at 919. And in the federal system, in appropriate cases, the multidistrict-litigation device allows cases to be coordinated for pre-trial purposes before being sent back to appropriate forums for trial. *See* PhRMA Br. 13-14. In fact, respondents could have filed in federal court and had their suits coordinated as part of the ongoing multidistrict litigation taking place in New Jersey. *See* Transfer Order, *In re Plavix Mktg., Sales Practices & Prods. Liab. Litig.*, No. 2418 (J.P.M.L. Feb. 12, 2013).

3. Respondents end with the curious claim that this case is a poor vehicle because Bristol-Myers conceded below the third, reasonableness prong of specific jurisdiction. Br. in Opp. 18-19. But that makes this case a *cleaner* vehicle: The correctness of the California Supreme Court's decision rests entirely on the relatedness standard this Court will announce.

Respondents' true argument appears to be that notions of predictability and fairness can only be considered as part of specific jurisdiction's reasonableness prong. *See id.* at 19-20. This Court, however, has always crafted jurisdictional rules in light of "the demands of reason and coherence" and "sound judicial policy." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1579 (2016)

(internal quotation marks omitted). Personal jurisdiction is no different. *See, e.g.*, *Daimler*, 134 S. Ct. at 760 (principal place of business and state of incorporation are the paradigm places for general jurisdiction because they "have the virtue of being unique * * * as well as easily ascertainable"); *see also Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010) ("Simple jurisdictional rules * * * promote greater predictability.").

CONCLUSION

The petition should be granted.

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